FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, and UNITED POLITICAL ACTION COMMITTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF

BERNARD KLEIMAN
One East Wacker Drive
Chicago, Illinois 60601

CARL FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 5, 6

International Molders Union v. Howard, No. 85-1629, *cert. denied*, 106 S. Ct. 2902 (1986) 2

Statutes:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* 1, 5, 6, 8

42 U.S.C. § 1981 ..... 1, 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2010

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *et al.*,
Petitioners,

v.

CHARLES GOODMAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF

The petition for certiorari demonstrated that the decision below rests on the controversial legal theory—as to which the Courts of Appeals are in conflict—that Title VII and 42 U.S.C. § 1981 impose on unions a duty to make affirmative efforts to prevent employers from discriminating. It also demonstrated that the sole factual basis on which the courts below found the petitioner unions liable on this theory was the district court's finding that, in filing grievances against the employer's alleged discriminatory actions, the unions made the arguments that they thought were most likely to win the individual grievances, rather than explicit arguments of race discrimination under the contractual non-discrimination clauses. The petition for certiorari also demonstrated that both the underlying legal theory and this particular application of it are fundamentally at odds with the national labor policy as expressed in federal statutes and this Court's decisions, and that the issue is an important one that merits review by this Court.[1]

[1] After the petition was filed in this case the Court denied a petition for certiorari presenting the same legal issue as the first

Respondents do not dispute the petition's showing that there is a conflict in the circuits over this theory of union liability, or that it is an important issue of federal labor policy. In addition, respondents acknowledge—in their rephrasing of the Question Presented—that the only factual basis for the judgment of liability below was the finding that the unions had intentionally framed grievances on grounds other than the collective bargaining agreement's non-discrimination clauses. Nonetheless, respondents attempt to evade certiorari by trying to make this case appear to be something other than what it is, and trying to make it appear that the decision below rests on something other than the controversial legal theory that unions have a duty to act affirmatively to prevent employer discrimination.

1. Despite respondents' attempts to recast the district court's findings, this is not a case in which the unions treated black and white employees unequally in grievance representation. At trial respondents tried to prove that there was a pattern of discriminatory representation in the grievance process, but the district court rejected that claim. (App. at 135-137a). Respondents did not appeal from the district court's finding of fact on that issue.

Nor is this a case of a union that failed to challenge employer discrimination. Respondents tried to prove a general claim of union "passivity" with regard to discrimination by the employer, but the undisputed evidence showed that the unions had made extensive efforts to stop or prevent the employer from engaging in discriminatory practices, including both negotiating for contract provisions that precluded employer discrimination and attempting to enforce the contract on behalf of black employees complaining of discriminatory acts. (*See* Pet. at 5-6). Accordingly, the district court found a "passivity" viola-

---

Question Presented in this petition. *International Molders Union v. Howard*, No. 85-1629, *cert. denied*, 106 S. Ct. 2902 (1986). The order denying certiorari in *Howard* noted that Justices Brennan, White, and Marshall had voted to grant certiorari. *Id.*

tion *only* with respect to the unions' preference for framing grievances on contractual grounds other than explicit allegations of race discrimination. (App. 137a, 138a).[2]

What the decision below rests on is nothing more than the lower courts' disagreement with the unions' strategic judgment about the best way to combat employer discrimination. Undisputed evidence at trial established that there were many provisions in the collective bargaining agreement, apart from the non-discrimination clauses, that effectively prevented discrimination. For example, the agreement provided that seniority would determine many employment decisions, including promotions and transfers. When the employer tried to select someone other than the senior employee, it had to justify that selection based on objective factors such as demonstrated superior ability on the part of the junior employee.[3] Union representatives testified that when they had such a contractual basis for a black employee's grievance, they could win the grievance without having to prove that the employer's decision was motivated by race. They also testified that in their experience allegations of race discrimination were often counterproductive and made it harder for them to win the relief the individual grievant

---

[2] Respondents also emphasize the fact that the unions succeeded in obtaining a general non-discrimination clause in 1962 from the largest steel companies that took part in national bargaining, but did not obtain the same clause at Lukens until 1965. (Brief in Opp. at 4). The district court reviewed this evidence, but did not find that it constituted evidence of any discriminatory animus or other improper motive on the part of the unions. (App. 133a-134a). Moreover, the district court understood—though respondents apparently have forgotten—that evidence of what happened in the 1962 negotiations, before Title VII was even enacted, could not provide any basis for liability in this case. (*Id.*).

[3] Another example of such a contractual provision is the requirement of "just cause" to support the discipline or discharge of a non-probationary employee. Management must justify any such disciplinary action with objective evidence of misconduct or other legitimate reasons. If there is no such evidence, "just cause" will not be found.

wanted. Moreover, the record contained a number of examples in which the unions had made a tactical judgment to base a black employee's grievance on grounds other than an explicit allegation of discrimination, and in which they had succeeded in winning all the relief that the employee wanted.

The district court did not find that the unions were wrong from a tactical standpoint in making these judgments; it did not find that individual grievances would have fared better (or even as well) if explicit allegations of race discrimination had been made. Indeed, the court credited the union representatives' testimony as to why the unions were "reluctant" to file grievances expressly alleging discrimination (App. 138a). Nonetheless, the court held that the unions violated the law by making this choice, because vigorous assertions of discrimination claims "would have focused attention on racial issues and compelled some change in racial attitudes." (*Id.*). Thus, in the district court's view, the unions' failure to pursue the course of action that the court preferred "served to perpetuate the discriminatory environment." (*Id.*). In short, the district court disagreed with the unions' priorities and held that the unions were obliged to pursue a strategy designed to produce global changes in the employer's "racial attitude" even if that strategy diminished the chances of getting complete and speedy remedies for individual acts of discrimination.

The court of appeals affirmed on precisely the same ground, relying entirely on the findings of the district court. The legal theory that supports the judgment is therefore nothing other than the unions' supposed duty to make affirmative efforts to prevent employer discrimination and, indeed, an even more troubling variant of that theory that requires the unions to make the particular efforts that a court believes would have had the broadest impact on discrimination.

The district court's "dead letter" finding, which respondents quote twice, was made in this same context.

Having just found that by not "vigorous[ly]" pressing explicit race discrimination claims the unions had missed an opportunity to change the company's attitude and had therefore "served to perpetuate the discriminatory environment," the district court found that "the unions' unwillingness to assert racial discrimination claims *as such* rendered the non-discrimination clause in the collective bargaining agreement a dead letter." (App. 138a; emphasis added). This finding expresses nothing more than the district court's disagreement with the unions' tactical judgment to rely when possible on other contract clauses in preference to the non-discrimination clauses.[4]

The issue pertaining to the employer's written tests fully illustrates the lower courts' theory. Respondents describe the facts in a way that suggests the unions never objected to those tests. (Brief in Opp. at 5). The district court, however, found (based on volumes of undisputed evidence) that "the unions did object to [the employer's] use of tests of all kinds"; the only fault found was that "the unions never based their opposition on the assertion that the tests had racially disparate impact." (App. 137a). The district court thus held that this was another tactical judgment that the unions were not permitted to make. But the undisputed evidence plainly shows that on the issue of testing, a showing of racially disparate impact was unnecessary. The testing provisions of the collective bargaining agreement—unlike Title VII—prohibited the use of all tests that were not job-related, regardless of whether they also had a disparate impact. Thus, while under Title VII as interpreted in *Griggs v.*

---

[4] In their description of the findings and decisions below, respondents recite that the district court held that the unions had "tolerated and tacitly encouraged racial harassment." (Brief in Opp. at 2). They fail to note that this ruling was based, like all of the other liability rulings with respect to the unions, solely on the unions' failure to file grievances arguing discrimination "as such." (*See* Pet. at 8-9 n.5). And, in any event, this liability ruling was vacated by the court of appeals as a result of its decision on the statute of limitations. (*Id.*).

Duke Power Co., 401 U.S. 424 (1971), a test is not prohibited unless it both has a disparate impact and is not job-related, the unions could stop the use of a test under the contract based solely on proof that the test was not job-related. Moreover, the undisputed evidence at trial was that the International Union had been uniformly successful throughout the steel industry in getting rid of written tests solely by prosecuting grievances based on the job-related issue, without having to undertake the additional burden of proving that the tests also had a disparate impact. It was also undisputed that this strategy had been developed and was being implemented by a black official who was Director of Arbitration for the International Union. Yet, despite the union's success, the lower courts held that it was unlawful to pursue this strategy for eliminating non-job-related tests.

2. Respondents also try to make this case appear to be one in which the unions completely failed to enforce black employees' contractual rights to be free of employer discrimination. (*See, e.g.*, Brief in Opp. at 4, 5-6, 8). Even if what respondents suggest is true, it would not change the underlying legal theory or the importance of granting plenary review in this case. The judgment below does not rest on any theory that the unions breached a *contractual* duty owed to black employees. It rests entirely on the lower courts' understanding that Title VII and Section 1981 require unions to take specific affirmative actions to prevent employer discrimination. And that understanding, as the petition showed, is at odds with both the statutes and the national labor policy.

In any event, in suggesting that the unions completely failed to enforce black employees' contractual rights to be free of discrimination, respondents have distorted the district court's findings and the record. As we already noted, many provisions of the contract other than the explicit non-discrimination clauses operated to prohibit discrimination. The district court did not find that by relying chiefly on these other provisions of the contract,

the unions had left black employees unrepresented on the subject of discrimination. On the contrary, the district court made explicit findings that in many areas of alleged discrimination the unions' grievance representation—albeit based largely on contract clauses other than the express non-discrimination clauses—had effectively protected black employees from employer discrimination. (Pet. at 7; App. 91a, 93a, 101a). Moreover, as we already discussed, the testimony regarding the unions' preference for using these other clauses explained that the unions' purpose was to choose the strategy that was most likely to obtain relief for the individual black employee who was complaining about employer discrimination. The record and findings thus show that both the intent and the effect of the unions' actions were to represent individual black grievants and obtain the best possible result for them.[5]

3. Respondents also assert that the unions' preference for not making explicit allegations of race discrimination in grievances amounted to racial discrimination against black employees. (Brief in Opp. at 6-7). No doubt, there could be cases in which unions, in choosing not to make arguments of discrimination, treated black and white grievants differently or were motivated by racial animus. If so, discrimination would be properly found. But this is not such a case. The findings of fact are inconsistent with respondents' assertion of discrimination.

As we already noted, the district court rejected respondents' claim that the unions' handling of grievances

---

[5] In addition, the undisputed evidence revealed approximately two dozen instances within the original limitations period—chiefly cases in which there was no contract clause to rely on except the non-discrimination clauses—in which the unions did file a grievance or other formal complaint expressly alleging discrimination. Because of that evidence the district court did not find that the unions never filed such grievances, only that they were "reluctant" to do so, for the reasons explained above. (App. 138a).

was racially discriminatory. Moreover, there was no evidence or finding that the unions treated black and white employees differently in making tactical decisions about how to frame individual grievances. Nor was there any evidence or finding that, in making the tactical decisions that they did, the unions were motivated by a desire that black employees lose their grievances or by a desire that black employees not have the same employment opportunities that whites had. And both the district court and the court of appeals clearly stated a theory of the case that was not premised on any requirement or finding of racial animus: the unions' liability existed " 'regardless of' [their] leadership's favorable disposition towards blacks." (App. 25a, 140a). It is thus clear that when these courts stated, without explanation, that the unions' failure to assert discrimination claims constituted discrimination against black employees, they were expressing a legal conclusion (albeit an erroneous one) and not a factual finding. (App. 26a, 147a).[6]

In an effort to lend some credibility to their assertion that the unions here were guilty of discrimination, rather than just tactical judgments that the courts below disapproved, respondents resort to quoting what was apparently a hypothetical "worst-case" situation that the district court postulated in reasoning to its conclusion that a decision not to argue race discrimination in a grievance is a violation of Title VII and Section 1981.[7] The district court reasoned: "A union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of

---

[6] It should be noted that the only place that the district court used the words "discriminated" or "discrimination" in reference to the actions of the unions is in its Conclusions of Law (App. 147a). The district court did not use those terms in the Findings of Fact to describe any action of the unions. (App. 132a-140a).

[7] Even so, respondents merely quote this passage and do not assert or attempt to argue that it constitutes a finding of fact in this case. *See* Brief in Opp. at 7.

success on other issues, or in deference to the perceived desires of its white membership" is liable. (App. 139a-140a). There is no doubt that in deciding whether to raise issues of race discrimination a union *could* be motivated by racial animus, or that if it followed its white members' wishes rather than the wishes of its black members, a union *could* harbor a racial animus or be guilty of disparate treatment. But that is *not this case*. Not only was there no finding that the unions were motivated by racial animus in any respect; the district court did not find that the unions shied away from raising discrimination claims in order to improve their chances of success on *other issues*. The testimony that the district court credited was that the unions made these tactical decisions in order to improve the chances of success in the very grievances in which race might be an issue. Nor was there any suggestion in the evidence, nor any finding by the district court, that in making these tactical decisions the unions were following the wishes of their "white membership" or that the unions' leaders perceived their "white membership" to be hostile to black employees' interests or to the elimination of race discrimination. The regular election of blacks to high union offices and their regular selection as representatives in negotiations as well as in the grievance procedure belie any such suggestion in this case.[8]

4. In an effort that can only be regarded as grasping at straws, respondents argue that the petition conceded the very issue it presented, quoting a passage from page 22 of the petition. Simply reading that passage in context demonstrates that it was not offered as a statement

---

[8] *See* Pet. at 5. Although the bargaining unit was approximately 75 percent white, in the 13 years preceding trial—which corresponded to the original limitations period—black employees were selected on three occasions to serve as chairman of the grievance committee and served as chairman for more than 5 years out of the 13. Moreover, black employees were regularly selected to be shop stewards—the front-line grievance representatives—in numbers that exceeded their percentages in the bargaining unit.

of what the law requires unions to do, but as a description of the practical things unions would have to do in order to avoid liability under the decision below.[9]

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

BERNARD KLEIMAN
One East Wacker Drive
Chicago, Illinois 60601

CARL FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

---

[9] The passage is as follows:

> A union cannot control management; it can affect management's conduct in running the business only to the extent that it can secure collective bargaining agreements that limit these managerial powers. A union cannot prevent employer discrimination that violates Title VII unless it negotiates for contract provisions that would prohibit management from engaging in practices that violate that law. And, if it succeeds in obtaining any such contract provisions, it must then expend its resources in the grievance/arbitration procedure to enforce those provisions.
>
> A union duty to take affirmative action to prevent employer discrimination thus dictates the substantive positions that the union must take in bargaining and in contract administration. This is contrary to the national labor policy.

(Pet. at 22).